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No. 80-802

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

NATIONAL GERIMEDICAL HOSPITAL AND GERONTOLOGY CENTER, *Petitioner,*

v.

BLUE CROSS OF KANSAS CITY AND BLUE CROSS ASSOCIATION, *Respondents.*

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

REPLY BRIEF FOR THE PETITIONER

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I.

The Conduct At Issue Was Not Authorized By The Planning Act.

Respondent Blue Cross of Kansas City ("Blue Cross") asserts that the conduct in question here was "specifically authorized and encouraged" by the Planning Act (Blue Cross Br., Question Presented); was "expressly authorized and intended under the directives of the Health Planning Act" (Blue Cross Br. at 22 n.16); was "deemed necessary by [the health systems agency] to assist in implementation of the [Health Systems Plan]" and was "directed and contemplated" under the Act. (Blue Cross Br. at 22 n.16.) Respondent Blue Cross Association ("BCA") argues, perhaps correctly, that this is how the conduct in question here was viewed by the courts below. (BCA Br. at 11-13.)

If the issue in this case was liability for conduct *required* by federal legislation, as respondent would have this Court believe, this would be a different case from what it is. The courts below relied on Section 300*l*-2(c)(1) of the Act to support their assump-

tion that the challenged conduct was somehow demanded by the Act, but the actual language of that provision simply does not support that conclusion:

> A *health systems agency* shall implement its HSP and AIP, and in implementing the plans it shall perform at least the following functions:
>
> (1) *The agency* shall seek, *to the extent practicable*, to implement its HSP and AIP with the assistance of individuals and public and private entities in its health service area. (Emphasis added.)

First, the provision plainly speaks to "the agency" and not to private entities; to the extent this provision requires, authorizes or encourages *any* conduct, it is *only* conduct by the agency itself. On this point, the record in this case is clear: the action complained of here was *not* taken by, or at the request of, a health systems agency. As respondent BCA concedes, the Blue Cross policy was "unilaterally adopted."[1] (BCA Br. at 11.) The conduct was neither sought, approved, nor even reviewed by any federal or state agency. This is volitional private conduct, and it cannot be shielded from antitrust scrutiny by mischaracterizing it as being statutorily mandated by the Planning Act.

Second, the plain language of Section 300*l*-2(c)(1) shows that Congress recognized there would be limits to private cooperation with an HSA. Unless we are to assume they are mere surplusage, the words "to the extent practicable" demonstrate that understanding. Boycotts, bribery, threats, and other forms of coercion may be effective tools in accomplishing a particular result, but they are forbidden to private and public entities alike by criminal statutes. It does not require any flight of fancy to assume that Congress recognized that illegal, coercive conduct by private entities, even if thought helpful by the HSA, would not be desirable and should not be encouraged. Nevertheless, this is respondents' argument: not that the boycott of National

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[1] While BCA may mean to exclude itself and others from the decision by this language, which begs the ultimate question at stake in this litigation, at a minimum this admission concedes the conduct challenged here was not undertaken pursuant to any governmental mandate.

Gerimedical was reasonable and thus does not violate the Sherman Act, but rather that it should not even be tested under traditional antitrust standards, because the Planning Act calls for the HSA to seek the "assistance" of private entities "to the extent practicable." The courts below have erroneously accepted this creative misuse of statutory language. This Court should correct that error.

II.

The Court Of Appeals Has Created Unlimited Immunity For Totally Voluntary Conduct Undertaken By Private Parties With No Governmental Supervision.

Both respondents attack petitioner's characterization of the opinion below as granting a "blanket exemption" from antitrust scrutiny for private conduct arguably consistent with the goals of the Planning Act. Respondent BCA argues that the word "blanket" does not appear in the opinion (BCA Br. at 16), and respondent Blue Cross asserts that this Court should look solely at the "holding" of the court of appeals, and ignore the context of the court's opinion and the opinion of the district court so heavily relied on by the court of appeals. (Blue Cross Br. at 5-7.)[2]

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[2] Blue Cross, in a massive understatement, states that "[t]here is language in the *District Court's* opinion which arguably could extend beyond the facts presented." (Blue Cross Br. at 5 n.2.) In fact, of course, the district court left no doubt that its decision was premised on the existence of a "blanket" exemption from the antitrust laws:

> In determining if an exemption to the antitrust laws can be implied, courts have distinguished two types of exemptions — specific and blanket. A specific repeal of the antitrust laws implies an exemption only for particular conduct or activity. An exemption for an entire legislative scheme would be a blanket exemption. Courts that have upheld claims of implied repeal have normally limited this repeal to the specific conduct challenged in that particular case; *however, in the circumstances of this case defendant's claim is that the entire concept of the National Health Planning and Resource Development Act presupposes non-application of the antitrust laws so that any activity authorized and within the scope of that Act is free from antitrust challenges.* The proper issue in this case

Indeed, says respondent Blue Cross, the opinion of the court of appeals "merely recognizes that conduct of private parties in compliance with federal legislation does not violate the antitrust laws." (Blue Cross Br. at 12.)

This is an accurate description of the opinion below only if one understands the phrase "in compliance with" to mean totally volitional conduct subject to no statutory or administrative mandate, direction, control, or review,[3] undertaken by private parties (including, as in this case, combinations of competitors)[4] who

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> then is whether there is a plain repugnancy between the scope of the National Health Care Planning and Development Act and the antitrust laws. Another formulation of this same test of somewhat easier application is whether an exemption to the antitrust laws is necessary to make this statutory scheme effective. The Court believes the answer is yes. *In the Court's view, voluntary cooperation of the entire health care industry, including third party payors, is essential to the success of the Act.* (Pet. App. at 32a; 479 F. Supp. at 1021) (emphasis added.)

As noted by the Solicitor General, "[s]ince the court of appeals did not limit or qualify the district court's recognition of a blanket immunity, the scope of that immunity appears to be sweeping." (Amicus Curiae Br. at 5.)

[3] BCA argues that National Gerimedical could have attempted to convince MAHSA to reverse its finding of hospital bed oversupply, and that this would be a satisfactory mechanism for review of the Blue Cross boycott. (BCA Br. at 19 n.26.) But the relevant issue is whether there was any administrative oversight over the anticompetitive conduct in question — in this case, the denial of participating hospital status by a combination of existing competitors to a newcomer in the market. In fact, this litigation is the only opportunity for National Gerimedical to gain any review of that boycott.

[4] Virtually all of National Gerimedical's competitors are Blue Cross member hospitals, and representatives of several of those hospitals served on the Blue Cross Board of Trustees during the time here relevant. (Record on Appeal at 4, 261, 272-79, 296-98.) Thus, Blue Cross is clearly an organization of competing providers whose alleged boycott of a potential newcomer to the market is an actionable concerted refusal to deal under section 1 of the Sherman Act. *Cf. Virginia Academy of Clinical Psychologists* v. *Blue Shield of Virginia*, 624 F.2d 476, 480-81 (4th Cir. 1980).

may have private economic or anticompetitive motives for their conduct. Petitioner submits that a broader antitrust exemption would be difficult to imagine. This result was clearly never intended, and in fact was implicitly rejected, by Congress. (*See, infra*, at pp. 6-7.)

The decision below misapplies the implied repeal standards articulated by this Court. The court of appeals apparently accepted the district court's assumption — totally without support in either the record below or logic — that antitrust liability for private entities would "foreclose" the accomplishment of the goals sought by the Planning Act. Therefore, concluded the court of appeals, there is "clear repugnancy" between the Act and the antitrust laws. (Pet. App. at 11a; 628 F.2d at 1056.) But the Planning Act neither calls for nor requires any concerted private action, much less boycotts by dominant insurance carriers. The Act does encourage an HSA to "seek, to the extent practicable . . . the assistance of public and private entities," but the HSA here had no regulatory power at all,[5] and in any event never asked Blue Cross to undertake this conduct. The courts below ignored both the statute and the facts in their conclusions of "clear repugnancy," thus failing to follow the analytical standards established by this Court.

With respect to legislative intent, the court of appeals merely adopted *in toto* the district court's flawed analysis, concluding that Congress must have intended "to immunize this type of voluntary action from the antitrust laws." (Pet. App. at 11a; 628 F.2d at 1056.) But Congress did not say so. Nowhere in the court's

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[5] During all times here relevant, Missouri had no compulsory certificate of need program in effect. Consequently, National Gerimedical was not required to undergo any need review. Furthermore, when Missouri enacted a certificate of need statute in 1979 (Mo. Ann. Stat. §§ 197.300 *et seq.* (Vernon Supp. 1980)), National Gerimedical and all similarly situated hospitals were deemed to have received certificates of need by the legislation itself. Thus, National Gerimedical at no time was required by any federal or state statute to undergo need review, and was boycotted by Blue Cross solely for failing to comply with the need review requirement unilaterally imposed by Blue Cross.

opinion is there any mention of the fact that Congress has twice specifically considered the immunity issue, or that it has included a provision in the Act which affords a narrowly delimited immunity from antitrust (and other) damages actions for HSAs, their employees and members. Significantly, that provision does not include any immunity for private parties.

As the oft-quoted remarks of Representative Rogers show,[6] the relationship of the Planning Act to the antitrust laws has hardly been a hidden issue. Indeed, the potential conflict was recognized at the time of the original legislation and Congress sought to deal with it by expressly immunizing individual members or employees of an HSA from damages actions, including those brought under the antitrust laws.[7] At the time of the 1979 Amendments, the issue had apparently become even more visible, and the exemption was broadened to include the HSA itself.[8] Significantly, Congress continually resisted attempts to extend immunity to providers and other private parties. Although it was specifically urged in 1979 to enact an immunity provision that also would have covered private parties[9], it declined to do so. Importantly, even

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[6] Both the district court and the court of appeals relied primarily on remarks by Representative Rogers made on the floor long after the Act was passed to support their conclusion that the Planning Act impliedly repealed the antitrust laws. (Pet. App. at 34a-36a, 479 F. Supp. at 1022-23; Pet. App. at 13a-15a, 628 F.2d at 1056-57.) As this Court has recognized, however, such postenactment statements by a single member are of doubtful value as an indicator of Congressional intent. *See United States* v. *Philadelphia National Bank*, 374 U.S. 321, 349.

[7] *See* National Health Planning and Resources Development Act of 1974, Pub. L. No. 93-641, § 1512(b)(4), 88 Stat. 2235 (1974).

[8] *See* Health Planning and Resources Development Amendments of 1979, Act of October 4, 1979, Pub. L. No. 96-79, § 110(d)(1), 93 Stat. 603-04 (1979).

[9] *See* Health Planning and Resources Development Amendments of 1979: Hearings before the Subcommittee on Health and the Environment of the Committee on Interstate and Foreign Commerce on H.R. 3041 and 3167, H.R. Rep. No. 96-12, 96th Cong., 1st Sess. 187-88, 641 (1979) (American Health Planning Association urging extension of immunity to "organizations, their employees,

the 1979 broadened immunity provision was limited to conduct undertaken without gross negligence or malice, and "required of, or authorized to be undertaken by, the agency."

In short, Congress clearly perceived this issue, and dealt with it in the way it thought appropriate. The respondents here are not health systems agencies, nor members or employees thereof, and the activities challenged here were concededly not "required of, or authorized to be undertaken by," an HSA. Thus, they remain fully subject to antitrust scrutiny, and the conclusion of the courts below that Congress intended some broader immunity is unwarranted and should be reversed.

III.

The Issue Presented Is Of Great And Continuing Public Importance.

Both respondents fervently argue that the facts in this case are unique because Missouri did not have certificate of need legislation in effect when this action arose. It is said that this case is not worthy of this Court's review because its specific facts are not likely to arise again. (BCA Br. at 6-7; Blue Cross Br. at 7-10.) Indeed, Blue Cross asserts that this case is the only one in which implied repeal is likely to be the "sole" issue, and then blandly concludes that all other cases arising under the Act will all be decided under the *Parker* v. *Brown* or *Noerr-Pennington* doctrines. (Blue Cross Br. at 9.)

These arguments unduly demean the basic issue which is clearly presented here. The principle on which this case rests — that purely voluntary conduct by private parties unsupervised by

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Board members and agents who voluntarily follow the recommendation of a SHPDA or HSA made in conformance with the requirements of this act"; American Medical Association urging that "[a] new section would be added to exempt actions taken in meeting the requirements of the Act from federal antitrust laws"). The Conference Committee rejected the proposed Senate version which would have extended immunity to "agents and consultants" of the HSA. *See* H.R. Rep. No. 96-420 (Conference Rep.), 96th Cong., 1st Sess. 66 (1979), *reprinted in* [1979] U.S. Code Cong. & Ad. News 1422, 1434.

any governmental agency may be exempt from antitrust scrutiny -- is far broader than the specific facts of this case. The decision below, if allowed to stand, will greatly expand the doctrine of implied repeal.

Moreover, respondents claim too much. As this Court clearly established in *California Retail Liquor Dealers Association* v. *Midcal Aluminum, Inc.*, 445 U.S. 97, the state action doctrine applies only where the challenged restraint is one "clearly articulated and affirmatively expressed as state policy," and "the policy . . . [is] 'actively supervised' by the State itself." 445 U.S. at 105. The *Noerr-Pennington* doctrine protects only advocacy before governmental bodies. Voluntary conduct undertaken by health care providers and insurers in ostensible support of the cost containment goals contained in the Planning Act will generally fall outside both exemptions, leaving the conduct fully subject to antitrust scrutiny, unless the antitrust laws are held, as in this case, to be impliedly repealed.

Among various ways in which the question can appear, the implied repeal issue is likely to arise in future cases involving the denial by Blue Cross of participating hospital status to newcomers in the market,[10] as well as other similar actions involving provider agreements which may have the effect of depriving the newcomer of the ability to compete fairly with existing providers. For example, in *Hospital Building Co.* v. *Trustees of Rex Hospital*, 425 U.S. 738, plaintiff alleged, *inter alia*, that Blue Cross had participated with an HSA official, the North Carolina Hospital Association, the defendant, and other parties in an overall scheme to prevent proprietary hospitals from gaining a place in the

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[10] Despite respondents' contentions to the contrary, such denials by Blue Cross are clearly not limited to the specific factual situation in this case, and may occur whether or not a state certificate of need program is in effect. *See Desgranges Psychiatric Center* v. *Blue Cross and Blue Shield of Michigan*, 1980-81 Trade Cas. (CCH) ¶63,576 (Mich. Cir. Ct. 1980) (defendant's refusal, pursuant to a statewide moratorium designed to control costs, to allow participation by a new outpatient clinic held violative of state antitrust laws where facility had obtained a certificate of need from state regulatory agency.)

market by imposing a discriminatory reimbursement formula on proprietary hospitals that was not made applicable to non-proprietary hosptials.[11] *Noerr-Pennington* is clearly no shield for such conduct, and the state action doctrine might well not apply. Yet, under the decision below, such voluntary actions would be immunized from antitrust attack, despite this Court's observation that "exempting provider agreements from the antitrust laws would be likely in at least some cases to have serious anticompetitive consequences." *Group Life and Health Insurance Co.* v. *Royal Drug Co.*, 440 U.S. 205, 232 n.40.

Nor is the impact of the decision below limited to voluntary actions taken by Blue Cross in ostensible pursuit of the cost containment goals of the Planning Act. For example, if several hospitals agree to allocate the market they serve for the ostensible purpose of reducing costs, such action would hardly be protected by either the state action or the *Noerr-Pennington* doctrines. Nevertheless, under the decision below, such cartel agreements would be argued to be exempt from antitrust review under the implied repeal doctrine. The same would apply to various "sharing" and other types of cooperative agreements among hospitals, which are rapidly spreading throughout the country.[12] Similarly, agreements on wage scales or room rates, made in the name of cost containment, would certainly be defended as immune from antitrust scrutiny under the decision below, even though neither the state action nor the *Noerr-Pennington* exemptions would even be arguably available. In short, the implied

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[11] *See* Plaintiff's Brief in Opposition to Defendants' Motion for Summary Judgment, *Hospital Building Co.* v. *Trustees of Rex Hospital*, Civ. No. 4048 (E.D.N.C. 1980), at 17-18. Plaintiff also alleged that Blue Cross had earlier denied participating hospital status to another proprietary hospital based on the same type of determination of need policy which is at issue in this case. *Id.* at 5-6.

For another case involving allegations similar to those in *Rex Hospital, see St. Bernard Hospital* v. *Hospital Service Ass'n of New Orleans, Inc.*, 618 F.2d 1140 (5th Cir. 1980).

[12] *See* E. Taylor, "Participation in Shared Programs Up Sharply, Survey Discloses," 51 *Hospitals* 192 (July 16, 1977).

repeal issue can arise in many types of cases involving voluntary anticompetitive conduct by health care providers and insurers allegedly undertaken to serve the goals of the Planning Act. The decision below invites such conduct. It should be reviewed by this Court to delimit the proper scope of the implied repeal doctrine in this area.

CONCLUSION

The questions raised are substantial, and of serious importance in the development of antitrust law. The petition for certiorari should be granted.

Respectfully submitted,

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